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No. [redacted] 168

In the Supreme Court of the United States

OCTOBER TERM, 1959

STATE TAX COMMISSION OF THE STATE OF ARIZONA,
PETITIONER,

vs.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Questions Presented for Review	1
Statement of the Case	2
Argument:	
A. The Supreme Court of the United States has no jurisdiction to review a state court decision which is founded upon an application of local law to facts determined to be controlling under local law and which is without the determination of a federal question	3
I. The Supreme Court of Arizona properly construed the Arizona Transaction Privilege Tax as an excise tax where the incident of taxation is engaging in business in Arizona	3
II. The Arizona court properly determined that under the facts of the case respondent had not engaged in business in Arizona	4
III. The logical conclusion, and express holding of the Arizona court was that respondent must have judgment as it was not subject to the payment of the excise tax	4
IV. The federal issue of constitutional immunity from state taxation was neither necessary to nor involved in the decision of the Arizona court	6
(a) The trial court's determination and petitioner's argument that a federal question was presented was held as an immaterial issue by the Arizona court	6
(b) The petitioner's injection of a federal issue is based upon its anticipation of respondent's contingent defense had respondent come within the purview of the privilege tax	6

Index Continued

Page

V. This Court has no jurisdiction as the record of the case does not affirmatively show that a federal issue was actually decided or was necessary to the judgment rendered 8

B. The United States Supreme Court will not grant certiorari to review a decision of a state court which is based on independent, non-federal ground 8

I. Where adequate state grounds sustain the judgment this Court will not review by certiorari, even though it appears that a federal question was passed upon in the state court's opinion.... 9

II. The Arizona court's holding that respondent was not doing business in Arizona such as to come within the purview of the statute is an independent state ground sufficient to sustain the judgment 10

C. This Court will not grant certiorari to determine a federal issue where such determination would be of no practical result 10

I. A precise holding by this Court on the issue proposed by petitioner would not affect the judgment of the Arizona Court 10

II. The basis of the Arizona court's decision makes a consideration of the asserted federal issue unnecessary 11

Conclusion 11

Appendix:

I 13

II 14

CITATIONS

CASES:

	Page
Arizona State Tax Commission v. Garrett, Corp., 79 Ariz. 389, 291 P. 2d 208 (1956)	3
Behn, Meyer & Co. v. Campbell & Go Tanco, 205 U.S. 403 (1907)	4
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	9
Buck v. People of State of Cal., 343 U.S. 99 (1952)	9
City of Cincinnati v. Vester, 281 U.S. 439 (1930)	11
De Saussure v. Gailford, 127 U.S. 216 (1888)	10
Dixon v. Duffy, 342 U.S. 33 (1951)	9
Durley v. Mayo, 351 U.S. 277 (1956)	8
General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944)	5
Geo. O. Richardson Machinery Co. v. Scott, 276 U.S. 128 (1928)	9
Hammerstein v. Superior Court of Cal., 340 U.S. 622 (1951)	9
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934)	8, 10
McCoy v. Shaw, 277 U.S. 302 (1928)	10

Citations Continued

Page

Merchants Mutual Auto. Liabil.ty Ins. Co. v. Smart,
267 U.S. 126 (1925) 4

Milk Wagon Drivers Union v. Meadowmoor Dairies,
312 U.S. 287 (1941) 4

Nickel v. Cole,
256 U.S. 222 (1921) 6

Norton Co. v. Department of Rev.,
340 U.S. 534 (1950) 7

Pelham v. Rose,
76 U.S. 103 (1869) 11

Republic Natural Gas Co. v. Oklahoma,
334 U.S. 62 (1948) 8

Senn v. Tile Layers Protective Union,
301 U.S. 468 (1937) 5

Skelly Oil Co. v. Phillips Petroleum Co.,
339 U.S. 667 (1950) 5, 7

Southwestern Bell Telephone Co. v. Oklahoma,
303 U.S. 206 (1937) 8, 9

Speiser v. Randall,
357 U.S. 513 (1958) 3

State Tax Commission v. Murray Co. of Texas, Inc.,
87 Ariz....., 350 P. 2d 674 (1960) 4, 5, 6, 7

Storaasli v. Minnesota,
283 U.S. 57 (1931) 4

Walters v. St. Louis,
347 U.S. 231 (1954) 6

Williams v. Kaiser,
323 U.S. 471 (1944) 11

Young v. Ragen,
337 U.S. 235 (1949) 9

Citations Continued

CONSTITUTION, STATUTES, RULES, REGULATIONS:

	Page
Ariz. Rev. Stat. § 42-1301 to 1347 Arizona Transaction Privilege Tax	1
Rules of U. S. Supreme Court, Rule 19	8
Rules of U. S. Supreme Court, Rule 23	6
United States Code, Title 28, Section 1257	8
United States Constitution, Article 1, Section 8, Interstate Commerce Clause	6

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 1028

STATE TAX COMMISSION OF THE STATE OF ARIZONA, PETITIONER,

vs.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Murray Company of Texas, Inc., your respondent, prays that the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Arizona, entered in the above-entitled case on March 30, 1960, be denied.

QUESTIONS PRESENTED FOR REVIEW

The Initial question before this Court is whether the Supreme Court of the United States has jurisdiction to review a decision by the Supreme Court of Arizona that a manufacturer had not engaged in business in the State of Arizona to a degree that would subject the manufacturer to the imposition of the Arizona Transaction Privilege Tax, Sections 42-1301 to 1347, Arizona Revised Statutes, which is an excise tax im-

posed on a vendor who exercises the privilege of engaging in business in Arizona.

If this Court determines that it does have jurisdiction, the question is whether this Court will grant certiorari to review a decision by the Supreme Court of Arizona which is adequately supported on non-federal ground.

A further question presented is whether this Court will grant certiorari to review hypothetical or abstract federal issues which were unnecessary to the decision of the Supreme Court of Arizona, where the determination of which would have no effect on the judgment as given by the Arizona Court.

STATEMENT OF THE CASE

Respondent specifically denies that portion of the statement of the case which appears on pages 2 and 3 of petitioners Petition for a Writ of Certiorari, entitled as "How Federal Question is Raised", on the grounds that petitioner's statements and conclusions therein are inaccurate and unsupported by both the facts of the case and the records of the opinions of the courts below.

Respondent begs the Court's indulgence in presenting another statement of facts; however, certain omissions and inaccuracies by petitioner prompt supplement and correction.

Respondent, on March 28, 1957, brought suit pursuant to Section 42-1339 of the Arizona Revised Statutes to recover Transaction Privilege Taxes paid under

protest. Several questions were raised in the trial court by the allegations of respondent's complaint, among which were allegations that respondent was not engaged in business in Arizona. (See Appendix I). The judgment of the trial court, Maricopa County Superior Court, Phoenix, Arizona, entered December 23, 1958, was for respondent based upon several grounds, the first of which was that respondent was not engaged in business in Arizona. (See Conclusions of Law of said Judgment in Appendix II). The case was appealed by petitioner to the Supreme Court of Arizona which affirmed the judgment of the trial court solely on the ground that respondent was not engaged in business in Arizona which would subject it to the Arizona Transaction Privilege Tax, and therefore respondent was not subject to the payment of such tax.

ARGUMENT

POINT A. *This Court is without jurisdiction to grant certiorari to review the judgment of a state court where the judgment of the state court was based upon the construction and application of a state statute without reference to or involvement of a federal question.*

The holding of the Supreme Court of Arizona was that, as a matter of local law, the Arizona Transaction Privilege Tax is an excise tax wherein the taxable event is engaging in business in Arizona. This construction is well founded in Arizona precedent, *Arizona State Tax Commission v. Garrett Corp.*, 79 Ariz. 389, 291 P. 2d 208 (1956), and is not questioned by petitioner. The construction of state laws is the exclusive responsibility of state courts, *Speiser v. Randall*, 357 U.S. 513 (1958), and the meaning and application of state laws

by a state supreme court is accepted by this Court. *Storaasli v. Minnesota*, 283 U.S. 57 (1931).

The Supreme Court of Arizona further held that, as a matter of the facts of the case, respondent was not engaged in business in Arizona within the meaning of the statute. Approximately one-half of the Arizona court's written opinion is devoted to a review of the facts presented by the case, and the holding of the court is based on a thorough consideration of these facts. This Court does not inquire whether there was error below in dealing with questions of fact. *Behn, Meyer & Co. v. Campbell & Go Tanco*, 205 U.S. 403 (1907); *Merchants Mutual Auto. Liability Ins. Co. v. Smart*, 267 U.S. 126 (1925). Where this Court has before it the findings of a trial court, authenticated by the state speaking through its highest court, this Court may reject such determination only if it can say that it was so without warrant, that is was a palpable invasion of Constitutional guarantees. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

The necessary conclusion of the Supreme Court of Arizona was that respondent was not subject to the payment of the Arizona privilege tax, and accordingly judgment was affirmed for respondent. Pertinent language of the Arizona court is cited as authority:

> "The cases upholding collection of a privilege tax are largely based upon the fact of an established business in the state." *State Tax Commission v. Murray Co. of Texas, Inc.*, 87 Ariz. ....., 350 P. 2d 674 at 676 (1960).
>
> "We held (in prior cases construing the Arizona Transaction Privilege Tax) the taxing incident was

engaging in business in Arizona and that the state could collect a tax on its gross proceeds of sale or gross income resulting from its business activities within the state." *Id.* at 679 (parenthetical matter supplied).

"The Murray Company was not engaged in business in this state." *Id.*

"Murray Company certainly has not subjected itself either to the excise tax or to the legal process of state courts in Arizona." *Id.* at 678.

"Considering all of the factual circumstances to which the parties have stipulated, they do not, in our opinion, put the plaintiff here in business in Arizona in any degree. They therefore are not subject to the payment of our privilege sales tax." *Id.*

With obvious clarity, the Supreme Court of Arizona determined the controlling facts of this case and applied its local laws in founding its judgment. This application by a state of its local laws and the facts upon which it founded its judgment are controlling in the Supreme Court of the United States, *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944), and the state decision is conclusive as to the construction and application of the state statute, *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937), and is not subject to re-examination by this Court. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). There being no pretense that the highest state court adopted its view of a non-federal question in order to evade an issue under the Federal Constitution, and the case having been decided upon grounds that have no relation to any federal question, this Court will accept the de-

cision of the state court, whether right or wrong. *Nickel v. Cole*, 256 U.S. 222 (1921).

The petition for Writ of Certiorari is framed on the federal issue of immunity from state taxation by reason of Article 1, Section 8 of the Constitution of the United States; accordingly, no other question will be considered. Rule 23, Supreme Court Rules.

The opinion of the Supreme Court of Arizona is entirely devoid of a decision on this federal question. Arguendo, the federal question was raised on the trial court level, and was contained in the Conclusions of Law of the trial court. However, as stated by the Supreme Court of the State of Arizona in disposing of these matters:

> "In view of the conclusion we have reached however the trial court's findings of fact and conclusions of law become immaterial." *State Tax Commission v. Murray Co. of Texas, Inc., supra* at 679.

Indeed, why should the Arizona Court concern itself with an issue of immunity from taxation when on the basis of the facts respondent was not a subject of taxation. This Court will not undertake to review what the court below did not decide. *Walters v. St. Louis*, 347 U. S. 231 (1954).

Petitioner erroniously injects the federal question into his petition. It assumes that respondent was held subject to the Arizona privilege tax, and that petitioner would have received judgment but for the court's holding that respondent had met the burden of showing the application of the tax would be an unconstitutional

burden on interstate commerce. The assumption is without merit. The Supreme Court of Arizona attempted to dispel petitioners belief that such a federal question was before the court by stating:

> "If it were *first* shown that Murray Company had submitted itself to the taxing power of the state and likewise to its judicial process *then* the burden would fall upon the taxpayer claiming immunity from such tax. Until it does, the law imposes no such burden upon it." *State Tax Commission v. Murry Co. of Texas, Inc., supra* at 678 (emphasis supplied).

Petitioner's injection into this case of a federal question in anticipation of respondent's defense, should respondent have been held as exercising the taxable privilege, does not make this suit one arising under the Constitution, and is not sufficient to give this Court jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co., supra.*

The Arizona court cited cases that have dealt with constitutional immunity of taxation, notably *Norton Co. v. Department of Rev.*, 340 U.S. 534 (1950). However, the citation and discussion was to point out that such cases were neither applicable nor controlling, for they were concerned with situations where the initial finding was that a doing of business in the state had subjected the litigant to the taxing power of the state, unlike this case before the Court. The Supreme Court of Arizona also utilized the terms "intrastate" and "interstate" during the course of its opinion. In view of the holding of the court, there can be no doubt but that these words were used by the court in examining the evidence to determine whether respondent was en-

gaged in business in the state of Arizona, and not whether respondent was clothed with constitutional immunity to shield it from an applicable state tax. Even though it conceivably may be surmised from quotations from a state court opinion that the court intended to rest its decision on the determination of a federal question, the jurisdiction of this Court cannot be founded upon surmise. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

The United States Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented, but that the state court decision of the federal question was necessary to a determination of the cause, or that a federal question was actually decided, or that judgment as rendered could not have been given without deciding it. *Durley v. Mayo*, 351 U.S. 277 (1956); *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. 206 (1937); *Lynch v. New York ex rel. Pierson, supra;* Title 28, Section 1257, United States Code; Rule 19, Supreme Court Rules. Respondent contends that the record in this case does not affirmatively show that any federal question was actually decided by the Supreme Court of Arizona or that such a decision was necessary to the judgment rendered. The policy against premature constitutional adjudication demands that any doubts in petitioner's burden of showing this Court's jurisdiction be resolved against jurisdiction. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948).

POINT B. *This Court will not grant certiorari to review a state court decision which is adequately supported on non-federal grounds.*

For purposes of this argument respondent will assume that it is affirmatively shown by the record that the judgment of the Supreme Court of Arizona of necessity involved the federal question of an unconstitutional burden on interstate commerce by taxation which would vest this Court with jurisdiction to grant certiorari.

The presence of an adequate state ground upon which to rest the decision of the Arizona court is present by the Arizona court's construction and application of the tax statutes as heretofore established by Argument Point A.

The rule is clear that the United States Supreme Court will not review a judgment of a state court which rests on adequate state grounds, *Hammerstein v. Superior Court of Cal.*, 340 U.S. 622 (1951); *Dixon v. Duffy*, 343 U.S. 33 (1951), otherwise known as adequate non-federal grounds. *Young v. Ragen*, 337 U.S. 235 (1949). This rule is applied even though it is not evident whether the federal issue has been passed upon, *Southwestern Bell Telephone Co. v. Oklahoma, supra*, or where a federal question was discussed, *Geo. O. Richardson Machinery Co. v. Scott*, 276 U.S. 128 (1928), or where the state court's opinion is ambigious, *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), or where it does not appear upon which of two grounds, federal or state, the judgment was based. *Buck v. People of State of Cal.*, 343 U.S. 99 (1952). The decision of a state court that an action based upon a state statute could not be sustained according to the provisions of the statute is adequate to sustain the judgment of the state court without reference to a federal

question also decided by the court. *De Saussure v. Gaillard*, 127 U.S. 216 (1888). Only where the non-federal ground is unfounded can the state judgment be reviewed. *McCoy v. Shaw*, 277 U.S. 302 (1928). Mr. Chief Justice Hughes spoke for a unanimous court in *Lynch v. New York ex rel. Pierson*, *supra* at 54, in stating:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Even assuming that there is ambiguity in the Arizona court's opinion, or that a federal issue was discussed, or passed upon, or was a ground of the court's opinion, this Court should not grant certiorari as the court's decision that respondent was not doing business in Arizona such as to come within the purview of the tax is an independent, non-federal ground sufficient in itself to sustain the judgment.

POINT C. *This Court will not grant certiorari to review an abstract or hypothetical question.*

Should this Court grant certiorari, and grant to petitioner the precise holding it desires, such determination would be of no practical result. The judiciary of Arizona would be apprised that under the facts of this case the Arizona Transaction Privilege Tax would not be an unconstitutional burden on commerce between the states. However, this knowledge would not affect the holding of the Arizona court that such privilege tax is not applicable to respondent under the facts of

this case, and that therefore respondent shall have judgment in its favor. This Court will not consider hypothetical or abstract questions from the determination of which no practical result can follow. *City of Cincinnati v. Vester*, 281 U.S. 439 (1930); *Pelham v. Rose*, 76 U.S. 103 (1869).

The Arizona Court was concerned with the issue of whether or not respondent was doing business in the state so as to be a proper subject of the tax. As respondent was held not to be doing business in the state, and thus not a subject of the tax, a determination of whether or not respondent would have been clothed with constitutional immunity under the commerce clause was unnecessary. This Court will not review a decision of a state court where the basis of the state court's decision makes a consideration of asserted federal questions unnecessary. *Williams v. Kaiser*, 323 U.S. 471 (1944).

CONCLUSION

Petitioners should be denied writ of certiorari because there is no federal issue involved in the matter which would substantiate the jurisdiction of this Court. If jurisdiction be determined by this Court, it is respectfully submitted that this Court should not lend its determination to hypothetical federal issues which are unnecessary to a decision and of no practical result.

Respectfully submitted:

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APPENDIX NO. I

Respondent's Complaint, paragraph V:

"For the reasons set forth in Exhibit 'A' defendant has collected illegally from the plaintiff the sum of $14,213.29."

Exhibit "A", attached to Complaint, paragraph 3.

"3. The purported assessment of additional taxes against said company in the amount of $14,213.29 is illegal, void and of no effect for the reasons as follows:

(a) The gross sales of company upon which said additional assessment was attempted to be measured (namely, 2% of the gross proceeds of sales or gross income from the business of engaging or continuing within this state in the business of selling any tangible property whatsoever at retail) did not constitute the gross proceeds of sales or gross income of said company derived by it from engaging or continuing within this state in the business of selling any tangible personal property whatsoever at retail.

* * * *

(d) The aforesaid sales were not made or consummated by the company in the State of Arizona.

(e) All sales made by the company upon which the Commission attempts to measure said additional assessment were made to customers in the State of Arizona pursuant to contracts entered into in the State of Texas; said contracts provided for the sale of cotton ginning machinery and prefabricated steel buildings

and the delivery thereof in the State of Texas; during the period of said audit the company did not maintain an office in the State of Arizona, did not keep any books or records in the State of Arizona and did not receive payment on the aforesaid contracts in Arizona.

* * * *

(g) The company did not, in connection with the aforesaid sales to customers in Arizona, carry on any business activities in the State of Arizona which would permit the State of Arizona to impose a privilege tax upon such activities measured by gross sales. . . ."

APPENDIX NO. II

Conclusions of Law of the Judgment of the Maricopa County Superior Court, Phoenix, Arizona, entered December 23, 1958.

"Based upon the foregoing Findings of Fact the Court concludes as a matter of law:

1. During the period involved herein plaintiff did not engage in any local business activities in the State of Arizona which would subject it to a tax imposed upon the privilege of engaging in the business of selling tangible personal property at retail."